

The seal of the Government of Madhya Pradesh is a circular emblem. It features a central shield divided into four quadrants: top-left with a crescent and star, top-right with a conch shell, bottom-left with a bull, and bottom-right with a lion. The shield is flanked by two elephants. Above the shield is a crown-like element. The entire emblem is encircled by a border containing the text 'UNITE WE STAND DIVIDE WE FALL' at the top and 'सत्यमेव जयते' at the bottom. Below the seal is the motto 'सत्यमेव जयते' in Devanagari script.

Respondent.

No. 14-0408 BN

Misty Brundridge is subject to discipline for making medication administration errors.

On April 2, 2014, the State Board of Nursing (“the Board”) filed a complaint seeking to discipline Brundridge. On April 8, 2014, Brundridge was served with a copy of the complaint and our notice of complaint/notice of hearing. On May 12, 2014, the Board filed a motion for default decision. We gave Brundridge until May 27, 2014 to file a response. In her response, Brundridge answered the allegations in the complaint. On our own motion, we accepted the document as Brundridge’s answer and considered it filed May 27, 2014. The Board filed an amended complaint on July 2, 2014, but did not seek leave to amend its pleading. On our own motion, we deem the amended complaint filed as of July 2, 2014. Brundridge did not file an answer to the amended complaint.

On September 17, 2014 we held a hearing. Rodney Massman represented the Board. Neither Brundridge nor anyone representing her appeared. The case became ready for our decision on October 20, 2014, the date the last written argument was filed.

Findings of Fact

1. Brundridge was licensed by the Board as a licensed practical nurse (“LPN”) at all relevant times.
2. Brundridge was employed as an LPN at Golden Years, a nursing home in Harrisonville, Missouri, at all relevant times.
3. In March and April 2013, Brundridge repeatedly administered medication to the wrong patient in a two-patient room at Golden Years. She administered medications to BN that were meant for EB.
4. Once Brundridge discovered her mistake, she failed to chart it in the patients’ records or inform officials at Golden Years.
5. When confronted about this mistake by Golden Years officials, Brundridge falsely claimed that BN complained of pain in his “bottom.”

Conclusions of Law

We have jurisdiction to hear the case.¹ The Board has the burden of proving that Brundridge has committed an act for which the law allows discipline.² The Board alleges that there is cause for discipline under § 335.066.2(5) and (12):

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or his certificate of registration or authority, permit or license for any one or any combination of the following causes:

¹Section 621.045. Statutory references are to RSMo. Supp. 2013 unless otherwise noted.

²*Missouri Real Estate Comm’n v. Berger*, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989).

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(12) Violation of any professional trust or confidence[.][³]

Additionally, the Board alleges that there is cause for discipline under §335.066.2(6)(h):

(6) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct, or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter, including but not limited to, the following:

* * *

(h) Failure of any applicant or licensee to cooperate with the board during any investigation[.][⁴]

The Board's Evidence

The Board's evidence in this case consists of three exhibits. Exhibit A is a copy of the Board's request for admissions, which the Board mailed to Brundridge on July 7, 2014, and to which she made no response. Under Supreme Court Rule 59.01, the failure to answer a request for admissions establishes the matters asserted in the request, and no further proof is required.⁵ Such a deemed admission can establish any fact, or "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law."⁶ That rule applies to all parties, including those acting *pro se*.⁷

³ RSMo Supp. 2012.

⁴ This provision became effective on August 28, 2013, and the Board has taken the position that facts supporting discipline of Brundridge under this provision arose on or after August 30, 2013.

⁵ *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985).

⁶ *Briggs v. King*, 714 S.W.2d 694, 697 (Mo. App. W.D. 1986).

⁷ *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983). Our Regulation 1 CSR 15-3.420(1) applies that rule to this case. All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

In the absence of further guidance, we might simply conclude that Brundridge admitted facts and that those facts authorize discipline. But statutes and case law instruct that we must “separately and independently” determine whether such facts constitute cause for discipline.⁸ Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

Exhibit B is an affidavit from the Board’s executive director, with attached records. The affidavit states, *inter alia*, that the executive director is “personally acquainted with the facts herein stated,” and that:

3. The 38 page(s) of records are kept by the Board in the regular course of business, and it was the regular course of business of the Board for an employee or representative of the Board with knowledge of the act, event condition [sic], opinion or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis.

Attached to the affidavit is a document titled “DETAILS OF INVESTIGATION.” It summarizes one interview with Susan Davis, RN, the Director of Nursing at Golden Years, and one interview with Michelle Overturf, LPN, who worked on an as-needed basis at Golden Years during the time Brundridge worked there. The investigation is not signed, dated, or attested. Attached to the investigative report are several exhibits, including the complaint report to the Board from Davis; some pages of a Golden Years employee handbook; Brundridge’s employee health form (dated March 14, 2013) and images of her prescription bottles, both of which support that she was prescribed Ativan and Vicodin (hydrocodone) at the time she was hired at Golden Years; Brundridge’s March 12, 2013 and April 11, 2013 drug screen results; copies of patient medication records from Golden Years; a Harrisonville police report; and a copy of the complaint notice from the Board to Brundridge (dated April 22, 2013), which was returned to the

⁸ *Kennedy v. Missouri Real Estate Comm’n*, 762 S.W.2d 454, 456-57 (Mo. App. E.D. 1988).

Board as undeliverable. All of this is hearsay, none of it is authenticated, and much of it is difficult to interpret.

Section 536.070(10) allows for the admission of business records into evidence when a proper foundation is laid. However, the majority of the Board's purported business records is nothing more than an investigator's narrative and interview summaries offered to prove the truth of matters asserted to the investigator by persons unaffiliated with the Board. These statements would certainly be inadmissible if subject to a hearsay objection.⁹ Brundridge did not appear at the hearing, so no hearsay objection was made. Therefore, we admitted the Board's Exhibit B in its entirety. Section 536.070(8) provides: "Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case." Thus, we are still bound to make some determination as to whether what is put into the record as evidence is truly probative.

The Board's evidence in this matter is almost exclusively hearsay, and much of it has negligible value. When the Board brings a case against a licensee, it has the burden of proof, and it should endeavor to meet that burden with relevant, admissible evidence tending to prove what the Board is alleging as grounds to discipline a licensee. The most probative portions of the Board's evidence are those that are corroborated by the statements made by Brundridge herself, including the Board's Exhibit C, which is a copy of the answer Brundridge filed with this Commission on May 27, 2014.

Professional Standards – Subdivision (5)¹⁰

In its amended complaint, the Board alleges that Brundridge's conduct constituted incompetency, misconduct, misrepresentation, and dishonesty. Therefore, we limit our analysis of this subdivision to these issues.

⁹*Edgell v. Leighty*, 825 S.W.2d 325, 329 (Mo. App. S.D. 1992).

¹⁰ RSMo Supp. 2012.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.¹¹ We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*.¹² Incompetency is a “state of being.”¹³ The disciplinary statute does not state that licensees may be subject to discipline for “incompetent” acts. Brundridges’s conduct of repeatedly, over the course of two months, administering medication to the wrong patient falls below the proper standard of care for an LPN. These repeated acts also show a state of being that Brundridge was unable to perform her occupation. We find that Brundridge acted with incompetency.

Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”¹⁴ We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”¹⁵ Also, direct evidence of intent is rarely susceptible to direct proof and therefore must generally be established by circumstantial evidence.¹⁶ Brundridge’s act of falsely claiming BN complained of pain was willful and with the wrongful intention of attempting to cover up her medication errors. She committed misconduct.

Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.¹⁷ Brundridge made a false and untrue statement when she claimed BN complained of pain. Therefore, Brundridge made a misrepresentation.

¹¹ *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

¹² 293 S.W.3d 423 (Mo. banc 2009).

¹³ *Id.* at 435.

¹⁴ *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

¹⁵ *Duncan*, 744 S.W.2d at 533.

¹⁶ *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App., S.D. 2001)

¹⁷ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 794 (11th ed. 2004).

Dishonesty is a lack of integrity or a disposition to defraud or deceive.¹⁸ Brundridge's conduct of falsely claiming BN complained of pain indicates both a lack of integrity and a disposition to defraud and deceive. Therefore, Brundridge acted with dishonesty.

Professional Trust – Subdivision (12)¹⁹

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.²⁰ It may exist not only between the professional and her clients, but also between the professional and her employer and colleagues.²¹

Patients and co-workers rely on LPNs to make and maintain accurate medication records and to give the proper medications to the correct patients in keeping with physicians' orders. Brundridge failed to follow medication orders and failed to take steps, such as charting or telling others of the mistakes, to correct this upon realizing her mistakes. She is subject to discipline under § 335.066.2(12).

Failure to Cooperate – Subdivision (6)(h)

The Board alleges that cause for discipline exists based on its allegation that Brundridge failed to cooperate with the Board during its investigation, after August 30, 2013. We note that the conduct complained of by the Director of Nursing at Golden Years occurred in March and April of 2013, before the effective date of the provision authorizing discipline for failure to cooperate. The business records of the Board show that its investigation took place primarily in July of 2013, with some later efforts to make contact with both Brundridge and the staffing coordinator at Golden Years by means of telephone messages. There are no specific dates on which calls were placed and messages were left for Brundridge, although the Board does supply

¹⁸ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

¹⁹ RSMo Supp. 2012.

²⁰ *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

²¹ *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App. E.D. 1989).

evidence that its notice of the complaint filed with the Board against Brundridge was never delivered to her.

We note that the most specific information relating to Brundridge's behavior after August 30, 2013 is an addendum to "DETAILS OF INVESTIGATION" document contained in Exhibit B, which is an e-mail from an unidentified individual named Robert ("Bob"). The e-mail states, "Here is a statement you can add to the report from Angie." It purports to disclose that Angie (who we surmise is Angie Citrin, the Board's investigator) called Brundridge four to six times between August 30 and September 15, 2013 and that Brundridge left a return message during that time. Notwithstanding the utter lack of reliability of this statement, assuming that it was proof of the matters asserted would not amount to sufficient evidence that Brundridge failed to cooperate with the Board. Furthermore, this statement contradicts the supposed admissions in the Board's request for admissions that assert Brundridge "repeatedly failed to return phone calls to the Board's investigator."²² We do not find cause for discipline under § 335.066.2(6)(h).

Summary

Brundridge is subject to discipline under § 335.066.2(5) and (12).²³

SO ORDERED on December 8, 2014.

\\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

²² Petitioner's Exhibit A, Request for Admission #12.

²³ RSMo Supp. 2012.